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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

MOHAMED ABOUELHASSAN,

Plaintiff,

v.

CHASE BANK, EXPERIAN, EQUIFAX CREDIT INFORMATION SERVICES, INC., TRANSUNION, DOE 1, aka "B-Line," inclusive,

Defendants.

CASE NO. C 07-03951 JF

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT [F.R.C.P. 12(b)(6)]

Date: March 21, 2008
Time: 9:00 a.m.
Courtroom: 3, 5th Floor
Hon. Jeremy Fogel

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I. INTRODUCTION

Plaintiff Mohamed Abouelhassan's opposition to Chase Bank USA, N.A.'s motion to dismiss his first amended complaint ("FAC") fails to support any of the three causes of action.

In the first cause of action for defamation there is plainly no allegation that Chase acted with "malice or willful intent to injure" as required in 15 U.S.C. § 1681h(e). Indeed, it is alleged at one point (¶ 12 of the FAC) that the publication was made negligently.

Plaintiff incorrectly argues, in a vain attempt to defend his second cause of action, that a creditor collecting in its own name and for its own account can be a "debt collector" under the federal Fair Debt Collection Practices Act. That argument is plainly incorrect under the language of the statute itself.

Finally, plaintiff does not really attempt to defend his third cause of action, which is premised on the notion that credit reporting of a discharged account can violate the discharge injunction under the Bankruptcy Act. Plaintiff cites no cases supporting that proposition and fails to rebut the numerous authorities cited in Chase's moving papers to the effect that there is no private right of action for such a claim.

II. THE FIRST CAUSE OF ACTION FOR LIBEL/DEFAMATION FAILS TO ALLEGE MALICE OR WILLFUL INTENT

Plaintiff correctly points out that the Court has already ruled that no cause of action for common law defamation lies in the absence of an allegation of malice and willful intent to injure, as required in 15 U.S.C. § 1681h(e). Plaintiff's opposition argues that the first amended complaint alleges six acts, including reporting payments as late, charging a high rate of interest, informing plaintiff that his account was sold, offering an account discharged in bankruptcy for sale and reporting an account under two different creditors' names. Apparently plaintiff argues that the court should infer malice and willful intent to injure from this list of acts. Plainly no such inference may be made. Most of the acts alleged do not even involve defamation, and there is nothing in the complaint to exclude the possibility that they were performed negligently or recklessly. Indeed, Paragraph 12 of the FAC specifically alleges that the publication was made with "professional negligence," an allegation that is inconsistent with the requirements of §

1681h(e).

Nowhere is it specifically alleged that Chase acted with "malice or willful intent to injure" Abouelhassan, as required in § 1681h(e). Plaintiff failed to make this allegation although he was specifically advised in the Court's ruling granting Chase's motion to dismiss the original complaint that such an allegation was required to support a claim for defamation and to avoid preemption. The allegations in paragraph 10 that Chase acted "willfully and without justification or privilege" or in paragraphs 19 and 20 that Chase acted "with bad faith and reckless disregard" plainly do not rise to the level of "malice or willful intent to injure." The malice or willful intent to injure contemplated by § 1681h(e) is of a higher degree than that which supports a claim of statutory or punitive damages for "willful non-compliance" under § 1681n. *Reed v. Experian Info Solutions, Inc.*, 321 F. Supp.2d 1109, 1117 (D. Minn. 2004). Acting willfully does not equate to acting with malice and willful intent to injure.

The claim for common law defamation alleged is also barred by the one year statute of limitations in C.C.P. § 340(c). The FAC specifically alleges in ¶¶ 10 & 16 that the publication was in December, 2004. That is the only publication alleged. The present complaint was not filed until June 27, 2007, some 1½ years after the statute had run.

III. THE FEDERAL FDCPA PLAINLY DOES NOT APPLY TO CREDITORS COLLECTING FOR THEIR OWN ACCOUNT

Plaintiff is simply incorrect that a creditor attempting to collect for its own account can be liable under the federal Fair Debt Collection Practices Act. The federal FDCPA applies only to "debt collectors." The term is defined in 15 U.S.C. § 1692a(6) as one who is in the business of collecting debts "owed or due another." Plaintiff has cited no authority to the effect that creditors who collect in their own name and for their own account and whose principal business is not debt collection on behalf of others are "debt collectors" subject to the Act. Plaintiff erroneously relies upon *Nielsen v. Dickerson*, 307 F.3d 623 (7th Cir. 2002). That case concerns a collection letter written by an attorney attempting to collect a debt for an issuer of credit cards. The case specifically holds that the credit card issuer "had not undertaken to collect anyone's debts but its own, and so would not normally constitute a debt collector under the statute," citing *Aubert v.*

American Gen. Fin., Inc., 137 F.3d 976, 978 (7th Cir. 1998). The credit card issuer was stated by the court to be subject to the federal FDCPA only pursuant to the so-called "false name" exception stated in § 1692a(6), whereby a creditor who uses someone else's name so as to suggest to the debtor that a third party is involved can be treated as a debt collector. There are no such allegations in the first amended complaint.

Next, plaintiff cites *Randolph v. IMBS, Inc.*, 368 F.3d 726 (7th Cir. 2004). This case deals with the issue of whether a demand for payment while the debtor is in bankruptcy (or after the debt has been discharged) creates a claim under the federal Fair Debt Collection Practices Act. There was no issue or dispute in *Randolph* case as to whether the person making the claim was a debt collector. The consumer in that case owed the debt to a dentist who had died. The dentist's office then hired a collection agency to collect old accounts. The Court of Appeal held that the trial court had incorrectly ruled that the Bankruptcy Code "preempts" the FDCPA. On this issue, the Seventh Circuit stated that it disagreed with *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502 (9th Cir. 2002), but the Ninth Circuit case must govern the outcome of the present motion. *Walls* specifically held that a remedy for collection of a debt in violation of a bankruptcy discharge injunction does not lie under the FDCPA. But even if the FDCPA did prohibit attempts to collect discharged debts, *Randolph*, *supra*, deals with collection activities by someone other than the original creditor, and is therefore completely inapposite.

IV. PLAINTIFF'S OPPOSITION DOES NOT ADDRESS THE THIRD CAUSE OF ACTION, WHICH IS ALSO BARRED BY APPLICABLE NINTH CIRCUIT AUTHORITY

The third cause of action alleges in paragraph 30 that Chase violated "Title 11" of the Bankruptcy Code "by reporting the discharged credit card account to the credit agencies as 24 late payments." In other words, no attempt by Chase to collect the discharged debt is alleged other than by way of its credit reporting of the account. The sole issue is therefore whether credit reporting of a discharged debt violates some part of Title 11 not specified in the FAC.

Plaintiff does not even attempt to explain what section of Title II is involved, and indeed, does not attempt to defend the Third Cause of Action in his opposition. The opposition cites no

authority that the credit reporting of an account violates either the automatic stay or the discharge injunction. Whatever rights and remedies plaintiff may have had in his own bankruptcy proceeding,[1] it is absolutely clear that there is no private right of action under 11 U.S.C. § 524(a) for violating the discharge injunction. In *Walls*, *supra*, the Ninth Circuit specifically rejected such a private right of action because it would put enforcement of the discharge injunction in the hands of a court that did not issue it.

Other courts have held that credit reporting post-bankruptcy of a formerly delinquent debt that has been discharged does not constitute an attempt to collect the discharged debt. *Mahoney v. Washington Mut., Inc. (In re Mahoney)*, 368 B.R. 579, 581 (Bankr. D. Tex. 2007). For these reasons, the third cause of action must be dismissed with prejudice.

V. CONCLUSION

For the reasons stated above, the Court should dismiss the first amended complaint without leave to amend.

Dated: March 6, 2008

ROPERS, MAJESKI, KOHN & BENTLEY

By:/s/ George G. Weickhardt
GEORGE G. WEICKHARDT
PAMELA J. ZANGER
Attorneys for Defendant
CHASE BANK USA, N.A

[1] Under 11 U.S.C. § 362(k), a debtor may recover damages for violation of the automatic stay, but here, no such violation is alleged. The alleged credit reporting occurred after the discharge, according to paragraphs 10 and 16 of the FAC. Moreover, it has been specifically held that nothing in § 362 prohibits creditors from making legitimate reports to credit agencies regarding the parties that have filed for bankruptcy. *Hickson v. Home Fed. of Atlanta*, 805 F. Supp. 1567, 1573 (N.D. Ga. 1992).

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Defendants.

CASE NO. C 07 03951 PVT

PROOF OF SERVICE

I am a citizen of the United States. My business address is 201 Spear Street, Suite 1000, San Francisco, CA 94105. I am employed in the County of San Francisco where this service occurs. I am over the age of 18 years, and not a party to the within cause. I am readily familiar with my employer's normal business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business. On the date set forth below, following ordinary business practice, I served a true copy of the foregoing document(s) described as:

- **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT [F.R.C.P. 12(b)(6)]**

☐ (BY FAX) by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date before 5:00 p.m.

☒ (BY MAIL) I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at San Francisco, California.

☐ (BY OVERNIGHT DELIVERY) I caused such envelope(s) to be delivered to an overnight delivery carrier with delivery fees provided for, addressed to the person(s) on whom it is to be served.

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☒ *(Federal)* I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on March 6, 2008, at San Francisco, California.

/s/ Wendy Krog
Wendy Krog